UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	No. 5:17–CR–882–DAE (1) (2)
vs.	§	
	§	
LUIS VALENCIA,	§	
MAURICIO VALENCIA	§	
	§	
Defendants.	§	

ORDER DENYING JOINT MOTION TO DISMISS
THE INDICTMENT (DKT. # 154)

Before the Court is a Joint Motion to Dismiss the Indictment under Rules 12(b) and 47 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution of the United States ("Motion to Dismiss") filed by Defendants Luis Valencia and Mauricio Valencia ("Defendants" or "Valencias") on October 29, 2018. (Dkt. # 154.) The Government filed a response in opposition on November 12, 2018. (Dkt. # 163.)

After carefully considering the memoranda filed in support of and in opposition to the motion, the Court—for the reasons that follow—**DENIES** Defendant's Motion to Dismiss the Indictment (Dkt. # 154).

BACKGROUND

The Defendants, along with three codefendants, were charged with: (1) Theft From Interstate Shipments, in violation of 18 U.S.C. § 659 (Counts 1 and 2); (2) Wire Fraud, in violation of 18 U.S.C. § 1343 (Counts 3–12); and (3) Money Laundering, in violation of 18 U.S.C. § 1957 (a) (Counts 13–22) in a 22 count indictment returned by a federal grand jury on November 15, 2017. (Dkt. # 1). The charges all stem from the alleged acquisition, transport, and sale of stolen oil. Defendants' Motion to Dismiss argues that the indictment is inadequate because: (1) it fails to adequately describe the elements of the offense as to Counts 1 and 2 (theft from interstate shipments) and thus lacks a sufficient factual basis to establish that the stolen oil was part of an "interstate shipment" for the purposes of 18 U.S.C. § 659; (2) because the indictment doesn't name any victims of the stolen oil, there is insufficient notice as to Counts 1–2 and also Counts 3–12 (as those counts, based on wire fraud, are premised on the stolen oil) such that defendants could not plea without being in danger of double jeopardy; and (3) the failure to adequately describe the offense elements as to Counts 1 and 2 means that there is a similar failure to describe the offense elements of Counts 13–22 (money laundering) because money laundering requires the money to be derived from a "specified unlawful activity" listed in 18 U.S.C. § 1956, and the failure to prove an

essential element of theft from interstate commerce means the requisite activity is lacking. (Dkt. # 154 at 2–8.)

LEGAL STANDARD

"Courts address alleged defects in an indictment by assessing the sufficiency of the indictment." United States v. Ayika, EP-11-CR-2126-DB, 2014 WL 12528355, at *3 (W.D. Tex. Sept. 15, 2014) (citing United States v. Contris, 592 F.2d 893, 896 (5th Cir. 1979)); see also Fed. R. Crim. P. 12(b)(3)(B)(v) (allowing defendants to file pretrial motions that allege, *inter alia*, "a defect in the indictment or information, including . . . failure to state an offense"). It is therefore well-established that, "[i]n order to fulfill the protections guaranteed under the Fifth and Sixth Amendments," Ayika, 2014 WL 12528355, at *3, "an indictment must set forth the offense with sufficient clarity and certainty to apprise the accused of the crime with which he is charged." United States v. Kay, 359 F.3d 738, 742 (5th Cir. 2004); see also Russell v. United States, 369 U.S. 749, 765 (1962) ("An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him is defective.")

The test for an indictment's sufficiency is not "whether the indictment could have been framed in a more satisfactory manner," but rather whether it conforms to minimal constitutional standards. Kay, 359 F.3d at 742 (quoting United States v. Ramirez, 233 F.3d 318, 323 (5th Cir. 2000)). Thus, the

sufficiency of an indictment is measured by two criteria: "(1) whether the indictment contains the elements of the offense charged and sufficiently apprises the defendant so that he will not be misled while preparing his defense; and (2) whether the defendant is protected against another prosecution for the same offense." United States v. Bearden, 423 F.2d 805, 810 (5th Cir. 1970) (citing Russel, 369 U.S. at 763). The Fifth Circuit has held that "ordinarily, the pleading of the allegations in terms of the statute is sufficient to fulfill this dual requirement." United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1082 (5th Cir. 1978) (citing United States v. Lester, 541 F.2d 499 (5th Cir. 1976)).

"[A]n indictment is tested by practical rather than technical considerations," and generally the "validity of an indictment is to be determined by reading the indictment as a whole." Ayika, 2014 WL 12528355, at *3 (internal quotations and citations omitted). Finally, "a motion to dismiss an indictment for failure to state an offense challenges the sufficiency of the indictment itself, requiring the court to take the allegations of the indictment as true and to determine whether an offense has been stated." United States v. Hogue, 132 F.3d 1087, 1089 (5th Cir. 1998) (citing Cadillac Overall Supply Co., 568 F.2d at 1082).

DISCUSSION

The Valencias move to dismiss Counts 1 and 2, theft from interstate shipments, in violation of 18 U.S.C. § 659 ("Section 659"), of the Indictment for

failure to describe an element of the offense with particularity. (Dkt. # 154 at 2.) The Valencias argue that the Indictment is fatally flawed because it does not "specifically allege facts that could prove the existence of an interstate shipment," a necessary element of the offense. (Id. at 4.) The Government responds that though the Defendants are correct that the element of interstate commerce "is recited, but not proved, in the indictment," the question of whether the oil stolen was actually a part of interstate commerce "is an element of the offense that the government must prove at trial . . . [to] be submitted to, and decided by, the jury." (Dkt. # 163 at 7.)

The Government is correct. "Fifth Circuit cases have implicitly accepted that the interstate commerce effect is a jury question and have dealt with instructions that a jury finding of certain specified acts beyond a reasonable doubt constitutes an effect on interstate commerce as a matter of law." Fifth Circuit District Judges Association Pattern Jury Instruction Committee, Pattern Jury Instructions, Criminal Cases, Note to Instruction 1.29 (1990) [hereinafter Note to Pattern Jury Instruction 1.29] (quoting United States v. Hebert, 131 F.3d 514, 521–22 (5th Cir. 1997); see also United States v. Miles, 122 F.3d 235, 239–40 (5th Cir. 1997).

As the Defendants themselves note, "[i]n order *to convict someone* of 18 U.S.C. § 659, the government must prove the following elements . . ." (Dkt.

154 at 4) (emphasis added). The flaw the Defendants have pointed to is not a flaw in the Indictment, rather, it is a hypothetical flaw during trial if the Government does not introduce evidence sufficient to prove that the stolen goods moved in interstate commerce in violation of § 659. The case the Defendants principally rely on, Shelton, does not dictate a different result. In Shelton, as here, interstate commerce was a necessary element of the offense charged. The Fifth Circuit upheld the indictment, holding that "an indictment alleging receipt of [goods] which had moved in commerce, and affecting commerce" was sufficient to charge the offense of receipt of a firearm shipped or transported in interstate commerce. United States v. Shelton, 937 F.2d 140, 142 (5th Cir. 1991) (per curiam) (quoting United States v. Perez, No. 90-8177 (5th Cir. Sept. 27, 1990), 917 F.2d 560 (table) (unpublished)). Further, the factual introduction to the indictment discusses the interstate commerce character of the alleged offense, discussing the origin point of the stolen oil in Cotulla, TX, refineries in "Texas, Louisiana, and other locations in the United States" and the oil being sold "on the national and international market." (Dkt. # 1 at 1–4.) While the introduction is far from perfect, and while whether these activities actually fall within the purview of interstate commerce is viable question for the jury, the Indictment does conform to constitutional standards. See Shelton, 937 F.2d at 142.

Shelton also speaks to the Defendants' second argument. The Defendants contend that failure to name the victims of the offense fails to provide adequate notice or protect the Defendants against the possibility of double jeopardy with regard to Counts 1-12. (Dkt. # 154 at 6–8.) The Defendants are correct in noting that the Indictment does not contain names: the companies are described by number as "Victim 1, Victim 2" etc. However, naming victims in an indictment is not constitutionally required. In Shelton, the Fifth Circuit noted that the indictment contained the requisite elements because "the indictment provided the defendant with enough facts to inform him of the charge that he would have to defend against" because it referred to the statute under which he was charged and the indictment provided the defendant with a list of the specific items he was charged with receiving. Id. at 143. The failure to name the victims is thus not a bar to the constitutional sufficiency of the Indictment itself. See Kay, 359 F.3d at 742.

The Defendants are also protected against another prosecution for the same offense. The factual introduction and Counts 1 and 2 of the Indictment make clear the relevant conduct, time period, and activity which, if proved beyond a reasonable doubt, would constitute a violation of § 659. (Dkt. # 1 at 1–8.) These factual details and close tracking of the relevant statutory language fully protect the Defendants from being tried again for the same offense. See United States v. Gordon, 780 F.2d 1165, 1172 (5th Cir. 1986) (holding that factual details and

language closely tracking the language of a statute were sufficient to protect a defendant from being tried again for the same offense). Furthermore, the Government has agreed to "provide the defendants with the names of the business entities that are identified in the indictment by number" which will sufficiently enable the Defendants to raise a double jeopardy defense in any subsequent prosecution for the same offense. (Dkt. # 163 at 8.) See United States v. Chappell, 6 F.3d 1095, 1099 (1993) ("An indictment need only charge the essential elements of the offense.") (internal quotation marks omitted); United States v. Giles, 756 F.2d 1085, 1087 (5th Cir. 1985).

With regard to the Defendants' third claim, that the elements of money laundering under 18 U.S.C. § 1957(a) are not met because of the failure to prove that the oil traveled in interstate commerce and thus that the money cannot be proven to have been "derived from a specified unlawful activity" within the meaning of 18 U.S.C. § 1956, as stated supra, the Government is not required to prove each element of the offense at the indictment stage. See Note to Pattern Jury Instruction 1.29; Shelton, 937 F.2d at 142; Hebert, 131 F.3d at 521–22; Miles, 122 F.3d at 239–40.

Taking the allegations of the Indictment as true, the Court finds that the Indictment is constitutionally sufficient because it both (1) contains the elements of the violation of 18 U.S.C. § 659, which in turn provides the elements

of 18 U.S.C. § 1957; and (2) provides Defendants adequate notice of the offense of which they are charged in spite of the victims being unnamed and thus sufficiently apprises the Defendants so that they will not be misled by preparing their defenses and so that they are protected against another prosecution for the same offense. The Government's concession to provide the defense with the names of the business entities also cures this alleged defect. See Bearden, 423 F.2d at 810.

CONCLUSION

Having found that the Indictment adequately states offenses against the Defendants in all Counts, the Court **DENIES** Defendants' Joint Motion to Dismiss the Indictment (Dkt. # 154) and **ORDERS** the Government to provide the Defendants with the names of the business entities identified by number.

IT IS SO ORDERED.

DATE: San Antonio, Texas, November 27, 2018

David Alan Ezra
Senior United States Distict Judge